STATE OF MICHIGAN

COURT OF APPEALS

KENNETH D. HESSE, Personal Representative of the Estate of JASON L. HESSE, deceased, KENNETH D. HESSE, CYNTHIA R. HESSE, and AMY R. HESSE, a minor, by her next friend, KENNETH D. HESSE,

Plaintiffs-Appellees,

v

ASHLAND OIL INC., a/k/a ASHLAND INC., d/b/a VALVOLINE INSTANT OIL CHANGE and VALVOLINE CO.,

Defendant-Appellant,

and

CHIPPEWA VALLEY SCHOOLS, JAMES. J. RIVARD, J. MURPHY, and RUTH ANN BOOMS,

Defendants.

UNPUBLISHED
January 12, 2001

No. 209075
Macomb Circuit Court
LC No. 95-004893 NO

Before: Owens, P.J., and Jansen and R.B. Burns*, JJ.

PER CURIAM.

Defendant-appellant Ashland Oil, Inc. (Ashland), appeals by leave granted from the trial court's order denying its motion for summary disposition of plaintiffs' claims for intentional tort, breach of contract, and negligent infliction of emotional distress. Ashland also challenges the trial court's order allowing plaintiffs to file a second amended complaint. We affirm in part, reverse in part and remand for further proceedings.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

On March 3, 1995, Jason Hesse, the deceased, James P. Murphy,[1] and Steven Schneider[2] signed a document entitled "Chippewa Valley High School Work Study Plan." The plan provided that Ashland would hire sixteen-year-old Jason to perform "basic automotive service" and "basic cleaning services" at Ashland's automotive service center located in Clinton Township. Also on March 3, 1995, Schneider completed a standard "CA-7 Work Permit and Age Certificate" concerning Jason's employment with defendant. The work permit provided that Jason was to work a total of 23 hours per week, at an hourly wage of $5, and also provided that Jason would not work past 7:00 p.m. Additionally, the work permit provided that Ashland "must provide competent adult supervision at all times" and provided that Jason's employment "will conform to all federal, state, and local laws and regulations." Schneider, Jason, and his mother, Cynthia Hesse, signed the work permit. On March 6, 1995, defendant Ruth Ann Booms, acting as Chippewa Valley Schools' agent, signed and issued the work permit.

In 1995, Ashland accepted used oil products from the general public at its automobile service centers. When customers dropped off used motor oil, they would identify the substance on a pre-printed form, record the amount they were leaving at the service center, provide their address and sign their name. The used motor oil was poured into a 1,000-gallon storage tank located in the basement of the service center.

On June 2, 1995, seventeen-year-old Bradley Dryer was working at Ashland's Valvoline service center along with Jason and others. Schneider had left Dryer in charge of the business while he was away from the service center. That day, Dryer accepted approximately five gallons of a black liquid in a paint bucket from an unknown man. As Dryer explained, when Ashland's employees accepted waste products from people, they "would look at them a little bit," but generally would not smell them unless they noticed "a certain smell." Dryer did not notice anything unusual about the black liquid, although he did not smell it and did not check its viscosity; he assumed it was used motor oil. However, when he poured the liquid into the storage tank, he noticed that there had been a paintbrush and some industrial plastic wrap in the paint can, along with the black liquid. A fire investigator concluded later that the substance Dryer accepted from the unknown person actually was gasoline, not motor oil.

At closing on June 2, 1995, it was Dryer's responsibility to check the level of the storage tank located in the basement. Dryer opened the top of the tank to look inside and determine its level. However, according to the fire investigator, he used the flame from his Bic lighter in order to see inside the storage tank. This caused an explosion and fire, which killed Jason, who had been standing nearby when Dryer checked the storage tank.

I

Defendant first argues that the trial court erred in denying its motion for summary disposition of plaintiffs' intentional tort claim under MCR 2.116C)(10). We agree.

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[1] Defendant Murphy was Jason Hesse's school counselor.

[2] Steven Schneider was the store manager of defendant Ashland Oil's "Valvoline Instant Oil Change" automobile service center in Clinton Township.

Summary disposition of all or part of a claim or defense may be granted when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When deciding a motion under (C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the moving party to determine whether a genuine issue of any material fact exists to warrant a trial. *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). On appeal, the trial court's decision is reviewed de novo. *Id.* The question whether the facts alleged are sufficient to constitute an intentional tort within the meaning of the intentional tort exception of the Worker's Disability Compensation Act, MCL 418.131(1); MSA 17.237(131)(1), is a question of law for the court. *Graham v Ford*, 237 Mich App 670, 674; 604 NW2d 713 (1999). Questions of law are reviewed de novo. *Hagerman v Gencorp Automotive*, 457 Mich 720, 727; 579 NW2d 347 (1998).

The purpose of the Worker's Disability Compensation Act ("WDCA"), MCL 418.101 *et seq.*; MSA 17.237(101) *et seq.*, is to compensate an employee for loss of wage-earning capacity due to a work-related injury. *Eaton v Chrysler Corp (On Remand)*, 203 Mich App 477, 486; 513 NW2d 156 (1994). Generally, disability benefits provided under the act are the sole remedy for work-related injuries. MCL 418.131(1); MSA 17.237(131)(1); *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 147; 565 NW2d 868 (1997). However, pursuant to MCL 418.131(1); MSA 17.237(131)(1),

> [t]he only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court.

For purposes of the intentional tort exception of the WDCA, a "deliberate act" includes both acts and omissions and encompasses situations in which the employer "consciously fails to act." *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 169-170; 551 NW2d 132 (1996) (Boyle, J.); *Palazzola*, *supra* at 149. The phrase "specifically intended an injury" means that an employer must have had a conscious purpose to bring about specific consequences. When the employer is a corporation, a particular employee must possess the requisite state of mind in order to prove an intentional tort. *Travis*, *supra* at 171-172; *Palazzola*, *supra* at 149. Thus, to state a claim against an employer for an intentional tort, a plaintiff must show that the employer deliberately acted or failed to act with the purpose of inflicting an injury upon the employee. *Travis*, *supra* at 172.

Where there is no direct evidence of intent to injure, intent may be inferred where a plaintiff can show that "the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." MCL 418.131(1); MSA 17.237(131)(1). "Actual knowledge" means that constructive, implied or imputed knowledge is not enough; nor is it sufficient to show that the employer should have known, or had reason to believe, injury was certain to occur. *Travis*, *supra* at 173; *Palazzola*, *supra* at 149. A plaintiff may establish a

corporate employer's actual knowledge by showing that a supervisory or managerial employee had actual knowledge that an injury would follow from what the employer deliberately did or did not do. *Travis*, *supra* at 173-174; *Palazzola*, *supra* at 149. To show that "an injury was certain to occur," a plaintiff cannot rely on the laws of probability, the mere prior occurrence of a similar event, or conclusory statements of experts. Further, an employer's awareness that a dangerous condition exists is simply not enough; a plaintiff must show that the employer was aware injury was certain to result from what the actor did. *Travis*, *supra* at 174-178; *Palazzola*, *supra* at 149-150. To show that the employer "willfully disregarded" actual knowledge that an injury was certain to occur, a plaintiff must prove that the employer's act or failure to act was more than mere negligence, e.g., failing to protect someone from a foreseeable harm. *Travis*, *supra* at 178-179; *Palazzola*, *supra* at 150.

Applying these principles to the facts of this case, we agree with Ashland's contention that the trial court erred in denying its motion for summary disposition of plaintiffs' intentional tort claim. There being absolutely no direct evidence that defendant or its managerial employees specifically intended to injure Jason Hesse, the question is whether the evidence, viewed in a light most favorable to plaintiffs, showed that Ashland or its managerial employees, specifically Bradley Dryer,[3] disregarded actual knowledge that an accident was certain to occur. The evidence does not show this.

First, plaintiffs contend that Ashland's hiring and training policies insured that the accident in question was certain to occur. However, the evidence does not support this conclusion. Ashland hired and trained minors and other employees to accept used motor oil and antifreeze from the public at large so that these substances could be recycled. Defendant trained employees to identify used motor oil by sight and smell. Pursuant to their training, employees were instructed to refuse substances purported to be used motor oil if they appeared to be too thin or too thick, or if they had odors that would indicate they were something other than used motor oil. Moreover, customers who returned used oil products to defendant's oil change centers were required to complete a pre-printed form to identify themselves and the substances they were returning. Thereafter, the used motor oil was stored in a 1,000-gallon storage tank located in the basement of the service center. Although it is clear from the evidence that Ashland's procedures created a risk that its employees, whether minors or adults, might accidentally accept combustible petroleum products or other volatile substances from members of the public at large and place them in the storage tank, it is just as clear that Ashland took precautions to prevent this from happening by training its employees to ascertain the identity of used automobile waste products. Evidence that Ashland was aware of the potential for danger is insufficient to show actual knowledge of certainty of injury, especially because Ashland took precautions to guard against that risk. See *Bazinau v Mackinac Island Carriage Tours*, 233 Mich App 743, 755-756; 593 NW2d 219 (1999). Plaintiffs have failed to submit further evidence to show that Ashland's

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[3] It is not clear that Dryer, by being left "temporarily in charge" at the service center, can be considered a "managerial employee." However, because we view the evidence in a light most favorable to the nonmoving party, *Ritchie-Gamester*, *supra* at 76, for the purposes of this decision – and without attempting to critically analyze the issue – we accept the view that Dryer was a managerial employee for Ashland.

hiring of minors, standing alone, and its failures to properly limit their hours of employment and provide them with constant adult supervision made it certain that an accident would occur.[4]

Second, although the evidence established that Ashland required its employees to periodically check the level of the petroleum products stored in the underground storage tank, there is nothing to suggest that this insured the occurrence of injury. Evidence showed that employees were expected to check the level of used oil in the storage tank by inserting a measuring stick into the tank. The evidence does not show this procedure to be unduly risky or certain to result in injury. Although Bradley Dryer denied there was a measuring stick available for checking the level of the storage tank, he acknowledged there was a flashlight available to look into the tank, but he either could not find it or its batteries were dead. There is absolutely no evidence to establish that Ashland or its managerial employees required employees to check the tank in an unduly dangerous manner, like using an open flame to check the tank. Although a state fire investigator concluded that Dryer did just that, thus causing the explosion, he based this conclusion on Dryer's out-of-court, hearsay statements that he used the flame from a Bic lighter to check the level of the tank's contents. The existence of a disputed fact must be established by admissible evidence. *Maiden v Rozwood*, 461 Mich 109, 123; 597 NW2d 817 (1999). Apart from Dryer's hearsay statements, there is no other evidence that witnesses saw him use an open flame to check the contents of the oil tank. The trial court should not have considered the investigator's inadmissible testimony in determining the existence of triable issues.

Third, the evidence does not show that Bradley Dryer had actual knowledge that, due to his actions, an injury was certain to occur, and that he willfully disregarded this knowledge. In his deposition, Dryer testified that, on the day of the accident, he accepted five gallons of a black liquid in a paint bucket from an unknown man. Dryer testified that he did not notice anything unusual about the black liquid, although he did not smell it and did not check its viscosity; he assumed it was used motor oil and poured it into the storage tank. However, when he poured the liquid, he noticed there had been a paintbrush and some industrial plastic wrap on the paint can, along with the black liquid. Although this evidence certainly is sufficient to establish Dryer's negligence, it is not sufficient to show that he had actual knowledge an injury was certain to occur, and yet disregarded this knowledge. As stated, Dryer assumed the liquid was used motor oil. He did not believe it was anything else. Plainly, the evidence does not show that Dryer believed injury was *certain* to occur based on his acceptance of the unknown liquid and its placement in the storage tank.

Even if plaintiffs could establish that Dryer checked the level of the oil storage tank by using the open flame from his lighter, the evidence, viewed in a light most favorable to plaintiffs, still establishes only that Dryer was negligent. In his deposition, Dryer testified that he was unaware of "the flash point of petroleum products." Although he was familiar with the

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[4] Plaintiffs also allude to the fact that defendant committed several violations of state safety regulations in regard to the employment of minors. Violations of legislative safety standards are not sufficient to circumvent the exclusive remedy provision of the WDCA. *Smith v Mirror Lite Co*, 196 Mich App 190, 193-194; 492 NW2d 744 (1992). Plaintiffs do not further establish that defendant's alleged violations made it certain that Jason Hesse's injury would occur.

combustibility of gasoline products, Dryer's testimony does not support the conclusion that he was aware the waste oil storage tank contained any combustible substances at all. Therefore, even if he took the extremely risky step of using an open flame to check the level of oil in the storage tank, there is no indication from the evidence that he was *certain* this act would lead to the explosion that killed Jason Hesse, or that he intended such an event to occur.

Moreover, Dryer was positioned on top of the storage tank when the explosion occurred and was injured in the accident. In *Palazzola*, *supra* at 145-146, the leader of an industrial maintenance crew ordered two employees into a storage tank containing toxic gases, where they were overcome by the fumes. The crew leader entered the tank to save one of the employees, but he too was overcome. *Id.* at 146. In analyzing whether the crew leader had actual knowledge of certain injury, this Court stated:

> [E]ven if [the crew leader]'s knowledge and actions could be imputed to his employer, plaintiff has not established that [the crew leader] had actual knowledge of certain injury. Assuming as true plaintiff's allegation that [the crew leader] generally knew about the dangers of [the toxic substance] and knew of its presence in the holding tank's water, those two facts do not establish knowledge of injury certain to occur. In his deposition, [the crew leader] testified that he did not appreciate the danger of [the toxic gas] in the holding tank. Further, his testimony is buttressed by evidence that he willingly entered the holding tank in an attempt to retrieve [the injured worker.] [*Id.* at 154 (footnote omitted).]

Here, Dryer's own dangerous position in the accident further supports Ashland's argument that he (and therefore, by imputation, Ashland) did not have actual knowledge of certain injury.

We conclude that, viewing the evidence in a light most favorable to them, plaintiffs failed to establish that Ashland or any of its managerial employees had actual knowledge that Jason Hesse's injuries were certain to occur, yet willfully disregarded this knowledge. Therefore, the trial court erred in denying Ashland's motion for summary disposition. Plaintiffs' intentional tort claim is barred by MCL 418.131(1); MSA 17.237(131)(1).

II

Next, Ashland argues that the trial court erred by refusing to grant its motion for summary disposition of plaintiffs' breach of contract claim. We agree.

As a preliminary matter, defendant argues that the exclusive remedy provision of the WDCA bars plaintiffs' breach of contract claim. See MCL 418.131(1); MSA 17.237(131)(1). Generally, a claim that an employer breached a contractual promise to provide safe working conditions merely amounts to a claim of negligence, which is barred by the exclusive remedy provision. *Schefsky v Evening News Ass'n*, 169 Mich App 223, 229-230; 425 NW2d 768 (1988). However, a claim based on the breach of an express contract to provide safe working conditions may survive a challenge based on the exclusive remedy provision. *Id.* at 230-231. Because plaintiffs' contract claim is premised on defendant's breach of an alleged express contract to provide safe working conditions to Jason, this claim is not barred.

The first problem with plaintiffs' breach of contract claim against Ashland arises from the physical aspects of the alleged contract, which is comprised of two separate documents, one entitled a "Work Study Plan" and the other a "Work Permit." The parties' arguments are premised on the assumption that this Court must read these documents together in order to determine whether plaintiffs have established the existence of a valid contract. However, while two documents may be read together to ascertain the terms of a single contract, one writing must reference the other instrument for additional contract terms. *Forge v Smith*, 458 Mich 198, 207; 580 NW2d 876 (1998). Here, the Work Study Plan and the Work Permit are two separate documents, neither of which contains terms referencing the other for the purpose of supplying contractual terms. Therefore, in the absence of any indication whatsoever that the parties intended them to be read together to form a complete contract, we must examine each separately.

The elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Detroit Trust Co v Struggles*, 289 Mich 595, 599; 286 NW 844 (1939). "The essence of consideration . . . is [a] legal detriment that has been bargained for and exchanged for [a] promise. *Higgins v Monroe Evening News*, 404 Mich 1, 20; 272 NW2d 537 (1978) (Moody, J). The parties to a contract must have *agreed and intended* that the benefits each derived be the consideration for a contract. *Id.* at 20-21 (Moody, J). As this Court observed in *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992), "a valid contract requires a 'meeting of the minds' on all the essential terms." Quoting from its opinion in *Stanton v Dachille*, 186 Mich App 247, 256; 463 NW2d 479 (1990), this Court stated:

> In order to form a valid contract, there must be a meeting of the minds on all material facts. A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind. [citing *Heritage Broadcasting Co v Wilson Communications, Inc*, 170 Mich App 812, 818; 428 NW2d 784 (1988).]

This Court construes contractual language according to its plain and ordinary meaning, avoiding technical or constrained constructions. *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1988). The construction of unambiguous contractual language is a question of law that this Court reviews de novo. *Id.*

Turning first to the Work Study Plan, plaintiffs contend that, with this document, they agreed to allow Jason to work for Ashland outside the scope of the Youth Employment Standards Act (YESA), MCL 409.101 *et seq.*; MSA 17.731 *et seq.*, in exchange for Ashland's agreement to "conform to all federal, state and local laws and regulations." Plaintiffs premise their argument on their contention that Jason would not have been allowed to work at Ashland's oil change center without the Work Study Plan "contract" because his employment at the oil change center was hazardous, and the YESA prohibits minors from engaging in hazardous occupations. See MCL 409.103; MSA 17.731(3). Plaintiffs contend that the Work Study Plan constituted a contract between "the employer and the governing body of the school district . . . at which the minor is enrolled" to exempt Jason's employment from the strictures of the YESA, as contemplated by MCL 409.118; MSA 17.731(18).

However, there is absolutely no evidentiary support for plaintiffs' position that, by signing the Work Study Plan, Ashland intended to exempt Jason from the YESA and provide for his occupational safety outside the Act. First, contractual language is read according to its plain meaning. *St Paul Fire & Marine Ins, supra*. There is absolutely no language in the Work Study Plan that would lead to plaintiffs' interpretation of the document. The Work Study Plan purports to be just that, i.e., a scholastic plan for Jason's participation in his school's work-study program, not a contract of exemption pursuant to MCL 409.118; MSA 17.731(18). In essence, plaintiffs ask this Court to view the Work Study Plan as a valid, enforceable contract, yet one that is not governed by its clear terms. We cannot accept such an invitation.

Second, other evidence belies plaintiffs' contention that the Work Study Plan was intended by the parties as a contract to exempt Jason's employment from the YESA. The fact that Jason was issued a Work Permit indicates, contrary to plaintiffs' position, that the YESA governed his employment at Ashland's oil change center. MCL 409.104(1); MSA 17.731(4)(1) states, in pertinent part, "a minor shall not be employed in an occupation regulated by this act until the person proposing to employ the minor procures from the minor and keeps on file at the place of employment a copy of the work permit or a temporary permit." However, a contract between an employer and a school board pursuant to MCL 409.118; MSA 17.731(18) completely exempts the employment of a minor from the YESA. This kind of contract would necessarily divest the employer of the responsibility of obtaining a work permit to employ the exempted minor under the YESA. The fact that the parties sought and obtained a work permit for Jason further indicates that the Work Study Plan was not the kind of contract of exemption contemplated by MCL 409.118; MSA 17.731(18).

Accordingly, we find a complete absence of a bargained-for exchange between the parties. While plaintiffs argue that Jason's parents allowed him to be employed without the protections of the YESA, in exchange for Ashland's agreement to guarantee Jason's safety, plaintiffs have utterly failed to provide evidentiary support for their position that this was the mutual intent and agreed-upon exchange of the parties when they executed the Work Study Plan. Without supporting evidence, plaintiffs have attempted to show the existence of a valid contract merely on the basis of their own, subjective view of the Work Study Plan, which is insufficient. *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 317; 575 NW2d 324 (1998).

Next, plaintiffs contend that the Work Permit constituted a valid contract between the parties. However, this document is fraught with the same deficiencies as the Work Study Plan. As discussed, Ashland was obligated under MCL 409.104(1); MSA 17.731(4)(1) to obtain a permit before it could employ Jason. There is absolutely no indication on the face of this document or elsewhere in the evidence that Ashland intended the Work Permit to be a contract exempting Jason from the YESA in exchange for Ashland's agreement to ensure Jason's safety in the workplace. Plaintiffs seek to convince this Court by resorting to their own, subjective understanding of the document as a legally enforceable contract. However, plaintiffs' subjective view of the Work Permit is irrelevant. *Marlo Beauty Supply, Inc, supra.* Indeed, the Work Permit is a statutorily required document that is required to be filed before a minor can obtain employment; this statutory purpose is inconsistent with plaintiffs' view of the document as a contract between Ashland and Jason's parents.

In sum, plaintiffs have failed to show an agreed-upon, bargained-for exchange — "the essence of legal consideration" – in relation to the Work Permit or the Work-Study Plan. *Higgins*, *supra*. Therefore, plaintiffs failed to demonstrate the existence of a valid contract between the parties. Because plaintiffs failed to establish the existence of triable facts with regard to whether the Work Study Plan and Work Permit constituted a valid contract between the parties, the trial court erred by refusing to grant summary disposition of plaintiffs' breach of contract claim.

III

Next, Ashland argues the trial court erred by refusing to grant its motion for summary disposition of plaintiffs' claims for negligent infliction of emotional distress. We disagree.

Michigan recognizes a cause of action in negligence for a parent who witnesses the negligent infliction of injury to his or her child and suffers emotional distress as a consequence. *Wargelin v Sisters of Mercy Health Corp*, 149 Mich App 75, 80; 385 NW2d 732 (1986). The elements of this tort are as follows: "(1) the injury threatened or inflicted on the child must be a serious one, of a nature to cause severe mental disturbance to the plaintiff; (2) the shock must result in actual physical harm; (3) the plaintiff must be a member of the immediate family, or at least a parent, child, husband or wife; and (4) the plaintiff must actually be present at the time of the accident or at least suffer shock 'fairly contemporaneous' with the accident." *Id.* at 81. "[T]he bystander need not actually witness the accident as long as the injury to the individual plaintiffs occurs fairly contemporaneous with the accident. These limitations insure against deceptive claims and restrict the cause of action to bystanders whom the tortfeasor could reasonably have foreseen might have suffered mental disturbance as a result of witnessing the accident." *Id.*

As a preliminary matter, Ashland argues that the exclusive remedy provision of the WDCA bars plaintiffs' negligent infliction of emotional distress claim. See MCL 418.131(1); MSA 17.237(131)(1). Generally, however, claims for negligent infliction of emotional distress brought by independent plaintiffs, even when they concern a work-related accident, constitute separate torts that are not dependent upon actual injury to, or recovery by, the injured worker. See *Auto Club Ins Ass'n v Hardiman*, 228 Mich App 470, 474-477; 579 NW2d 115 (1998) and *Barnes v Double Seal Glass Co, Inc*, 129 Mich App 66, 75-76; 341 NW2d 812 (1983). Thus, the exclusive remedy provision does not bar plaintiffs' claims for negligent infliction of emotional distress.

Ashland next argues that plaintiffs produced no evidence that Kenneth and Cynthia Hesse suffered actual physical harm as a result of the accident, other than the expected shock and distress stemming from the death of their son. We disagree. Evidence showed that Cynthia Hesse became so hysterical when she arrived at the scene of the fire that she required immediate medical treatment and sedation. Further, in her deposition, Cynthia Hesse testified that she experienced additional medical problems as a result of her trauma. Mrs. Hesse testified that her preexisting bladder condition was exacerbated by her nervous condition after Jason's death. Moreover, she suffered at least one nightmare related to Jason's death, during which she reacted so violently that she pulled muscles in her neck and shoulder, which required medical attention. Clearly, plaintiffs established a triable issue with regard to whether Cynthia Hesse incurred actual

physical injury due to the shock she experienced because of her son's death. See *Daley v LaCroix*, 384 Mich 4, 15-16; 179 NW2d 390 (1970); *Toms v McConnell*, 45 Mich App 647, 656-657; 207 NW2d 140 (1973).

Further, plaintiffs succeeded in establishing a triable issue with regard to whether Kenneth Hesse suffered an actual physical injury. According to the evidence, Kenneth Hesse experienced shock and trauma related to Jason's death. Mr. Hesse reported experiencing "depression, anxiety[,] sleeping problems" and an inability to concentrate. He also stated that Jason's death had caused him to abuse alcohol. In August 1996, a doctor prescribed Mr. Hesse Prozac because he was having "[a] lot of trouble with energy," which was related to Mr. Hesse's state of grief following Jason's death. This evidence establishes a triable issue with regard to whether Mr. Hesse suffered actual physical injury as a result of the accident.

Ashland also argues that plaintiffs failed to submit evidence to show that the Hesses suffered shock "fairly contemporaneous" to the accident. We disagree. According to the evidence, the Hesses were notified of the explosion and arrived at the scene shortly after it occurred, while the fire still raged at the service center, which was located approximately one half mile from their house. They were present for the entire unsuccessful rescue operation. While the fire was still burning, a police officer approached Kenneth Hesse and told him that Jason was dead. Therefore, the evidence establishes a triable issue whether the Hesses suffered shock "fairly contemporaneous" to the accident that resulted in Jason's death. *Gustafson v Faris*, 67 Mich App 363, 369-370; 241 NW2d 208 (1976). Accordingly, the trial court did not err in refusing to summarily dismiss plaintiffs' claims for negligent infliction of emotional distress.

IV

Finally, Ashland takes issue with several of the trial court's rulings, including its failure to timely rule on one of their motions for summary disposition, its decision to allow consolidation of the plaintiffs' claims against it brought in two separate lawsuits, and its decision to allow plaintiffs to file a second amended complaint. We have examined Ashland's arguments as to these issues and have determined that its true argument concerns the trial court's discretionary decision to allow plaintiffs to file a second amended complaint, thus adding their claim of negligent infliction of emotional distress. However, Ashland has not attempted to address the merits of the trial court's decision to grant plaintiffs' motion to amend. Failure to argue an issue results in its abandonment on appeal. *Dresden v Detroit Macomb Hosp Corp*, 218 Mich App 292, 300; 553 NW2d 387 (1996). Accordingly, we decline to address this issue further.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Robert B. Burns